UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DONG LIU; YUHONG HUANG,

Plaintiffs,

v.

MICHAEL CHERTOFF, Secretary of U.S. Department of Homeland Security; ROBERT S. MUELLER; Director of Federal Bureau of Investigation; EMILIO GONZALES, Director of U.S. Citizenship and Immigration Services; and CHRISTINA POULOS, Acting Director, California Service Center, U.S. Citizenship and Immigration Services,

Defendants.

CASE NO. 07CV0005 BEN (WMC)

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

On January 9, 2007, pro se plaintiffs Dong Liu and Yuhong Huang ("Plaintiffs") filed a complaint seeking to have defendants Michael Chertoff, Secretary of the Department of Homeland Security ("DHS"), Robert Mueller, Director of the Federal Bureau of Investigation ("FBI"), Emilio Gonzalez, Director of United States Citizen and Immigration Services ("USCIS"), and Christina Poulos, Acting Director, California Service Center, U.S. Citizenship and Immigration Services ("CSC") (collectively "Defendants") properly adjudicate Plaintiffs' I-485 applications to register permanent residence or adjust status. (Doc. No. 1.) Presently before the Court is defendants' motion to dismiss. (Doc. No. 5.) For the following reasons, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion.

I. BACKGROUND

A. Factual Background

Plaintiffs are natives and citizens of China. (Compl.¶ 2.) On July 22, 2004, Plaintiffs each filed I-485 applications to register permanent residence or adjust status with USCIS.[1] *Id*. After filing their adjustment applications, Plaintiffs made multiple inquires of Defendants seeking information regarding the status of their respective applications. (*Id*. ¶ 13.) Plaintiffs also sought assistance from their United States Senator and local Congressional representative. (*Id*. ¶ 12.) In the course of Plaintiffs' correspondence with USCIS, Plaintiffs learned that their FBI name check results (one of the necessary investigative steps in processing Plaintiffs' applications) were still pending. (*Id*. ¶ 13.) Plaintiffs allege that the required FBI checks have been pending for over two years and that Defendants have failed to process the applications towards final adjudication. *Id*. Plaintiffs request this Court: 1) order the FBI to expedite the background investigations; and 2) order the CSC to adjudicate their applications. (*Id*. ¶ 17.)

B. Procedural Background

On January 9, 2007, Plaintiffs filed a complaint seeking to have Defendants properly adjudicate their I-485 applications to register permanent residence or adjust status. (Doc. No. 1.) On March 20, 2007, Defendants filed their motion to dismiss. (Doc. No. 5.) On April 10, 2007, Plaintiffs filed their opposition. (Doc. No. 8.) On April 17, 2007, Defendants filed a reply. (Doc. No. 9.) The matter is now fully briefed, and the Court finds it appropriate for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1).

II. DISCUSSION

A. Legal Standard

Defendants have moved to dismiss Plaintiffs' entire suit against them under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, and under Rule

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[1] Plaintiff Dong Liu also filed a Form I-140 (immigration petition for alien worker), which was approved on March 31, 2005.

12(b)(6) for failure to state a claim upon which relief can be granted.

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court over the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction and possess 'only that power authorized by Constitution and statute.'" *Sandpiper Village Condominium Ass'n., Inc. v. Louisiana-Pacific Corp*., 428 F.3d 831, 841 (9th Cir. 2005). Limits upon federal jurisdiction must not be disregarded or evaded. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A-Z Intern. v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (internal quotation and citation omitted). It is the burden of plaintiffs to persuade the Court that subject matter jurisdiction exists. *See Hexom v. Oregon Dept. of Transp*., 177 F.3d 1134, 1135 (9th Cir. 1999).

A motion to dismiss for lack of subject matter jurisdiction may be "facial" or "factual." *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) *cert. denied* 544 U.S. 1018 (2005). A facial attack challenges the sufficiency of the jurisdictional allegations in the complaint. *See Id.* In contrast, a factual attack challenges the substance of a complaint's jurisdictional allegations. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989). If the defendant brings a facial attack, a district court must assume that the factual allegations in the complaint are true and construe them in the light most favorable to the plaintiff. *See Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1990). A Rule 12(b)(1) motion will be granted if, on its face, the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a) of the Federal Rules of Civil Procedure. *See Warren v. Fox Family Worldwide, Inc*. 328 F.3d 1136, 1139 (9th Cir.2003).

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *See Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). Rule 12(b)(6) permits dismissal of a claim when the claim lacks a cognizable legal theory or there are insufficient facts alleged to support plaintiff's theory. *See Balistreri v. Pacifica Police Dept*., 901 F.2d 696, 699 (9th Cir.1990). In considering the sufficiency of a complaint under Rule 12(b)(6), courts cannot grant a motion to dismiss "unless it appears beyond doubt that

the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* *(citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In resolving a Rule 12(b)(6) motion, the court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996). If a complaint is found to fail to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. *See Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995).

The Court recognizes the mandate to construe a pro se plaintiff's pleadings liberally in determining whether a claim has been stated. *See Ortez v. Washington County, State of Oregon*, 88 F.3d 804, 807 (9th Cir. 1996).

B. Analysis

Plaintiff asserts three statutory bases for subject matter jurisdiction: 1) mandamus jurisdiction pursuant to 28 U.S.C. § 1361; 2) the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"); and 3) the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. ("DJA"). (Compl. ¶ 7.) Defendants, on the other hand, maintain that none of these statutes vest the court with subject matter jurisdiction in this case.

1. Mandamus Jurisdiction

Defendants argue that § 1361 does not provide subject matter jurisdiction over USCIS's adjudication of Plaintiffs' I-485 applications because USCIS's duty is discretionary. Title 28 U.S.C. § 1361 states that the District courts have original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to a plaintiff." A writ of mandamus is an extraordinary remedy and is available where: (1) the individual's claim is clear and certain; (2) the official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *See Kildare v. Saenz*, 325 F.3d 1078, 1084 (9th Cir.2003); *see also Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968) ("Mandamus will lie only to compel ministerial duty plainly defined by law and not to compel an exercise of discretion."). Nor may

mandamus be used to instruct an official how to exercise his or her discretion. *See Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968). Furthermore, the district court has discretion to not issue a writ of mandamus even where the prerequisites have been satisfied. *See San Jose Mercury News, Inc. v. United States District Court*, 187 F. 3d 1096, 1099 (9th Cir. 1999).

Plaintiffs' filed their I-485 applications pursuant to § 245 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255. The statute states in relevant part:

> The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a). The Court, however, is limited in its review of discretionary decisions or actions of USCIS regarding I-485 applications pursuant to section 242 of the INA. The statute states in relevant part:

> Notwithstanding any other provision of law (statutory or nonstatutory), including. . . section[ ] 1361 . . . no court shall have jurisdiction to review--
> (i) any judgment regarding the granting of relief under section . . . 1255 of this title, or
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii). These statutes taken together illustrate Congress' intent to preclude the courts from reviewing discretionary decisions or actions of the USCIS to include I-485 applications.

Defendants argue that their discretion also extends to the pace of adjudicating Plaintiffs' applications. In furtherance of their position, Defendants note the absence of any statutes or regulations which limit the time the Department of Homeland Security, the Attorney General, or the FBI must act in adjudicating an I-485 application. *See* 8 C.F.R. § 245 *et seq.*; *Compare* 8 U.S.C. § 1447(b) (requiring USCIS to make a determination on a naturalization application within 120 days after it conducts a naturalization examination). Plaintiffs maintain, however, that Defendants' discretion extends only to the *final* determination of their applications. Plaintiffs argue that Defendants duty to "process the application[s] within a reasonable time" is non-

discretionary. (Pls. Opp'n at 5.)

Defendants have provided the declaration of Wendy S. Clark, the Acting Assistant Center Director with the USCIS' CSC. (Decl. Wendy S. Clark, ISO Defs. Mot. Dismiss. Ex. A, hereafter, "Clark Decl.") Ms. Clark attests that she has reviewed the records regarding Plaintiff Dong Liu's I-485 application, and that to date, required security checks have yet to be completed, preventing USCIS from adjudicating Plaintiffs' applications. (Clark Decl. ¶ 14.) While the security checks have been completed for Plaintiff Yuhong Huang, she is an accompanying spouse and not otherwise entitled to an immigrant status or immigrant visa under 8 U.S.C. § 1153(d); therefore, her application cannot be adjudicated independently. *Id.* Both applications will be adjudicated once the required security checks are completed for Plaintiff Dong Liu. *Id.*

Before a decision is rendered on an alien's application to adjust status, USCIS (in conjunction with the FBI) conducts several forms of security and background checks to ensure that the alien is eligible for the benefit sought and that he or she does not pose a risk to national security or public safety. (*Id*. ¶¶ 3-4.) These checks enhance national security and ensure the integrity of the immigration process by screening out aliens who may seek to harm the United States and its citizens. *Id.* These checks include: 1) an FBI name check that is run against FBI investigative databases, which is compiled by law enforcement agencies and includes administrative, applicant, criminal, personnel, and other files; 2) an FBI fingerprint check that provides information regarding an applicant's criminal background within the United States; and 3) a check against the Interagency Border Inspection System, which contains records and information from over 20 federal law enforcement and intelligence agencies that is used *inter alia* to compile information regarding national security risks, public safety concerns, and other law enforcement concerns. (*Id*. ¶ 4; USCIS Fact Sheet, ISO Defs. Mot. Dismiss. Ex. 1 at 2, hereafter, "USCIS Fact Sheet.")

The CSC receives approximately 5000 I-485 applications monthly and currently has 30,000 I-485 applications awaiting adjudication. (Clark Decl. ¶ 6.) Ms. Clark explains that sometimes a lengthy delay is unavoidable because the security check may reveal derogatory information on the subject alien. (*Id*. ¶ 10.) That derogatory information is sometimes possessed by another

government agency and the substance of that information is not always revealed. *Id*. Even after all of the known information from government agencies is collected, further investigation may still be required. *Id*.

Ms. Clark also explains that aliens who have applied for adjustment of status may apply for and obtain employment authorizations for the entire time their application is pending. (*Id*. ¶ 13.) Applicants for adjustment of status can also apply for and obtain advance parole to enable them to travel abroad during the pendency of their applications. *Id.*

The federal courts have recently become inundated with naturalization actions seeking declaratory relief as is the case here. Some district courts have determined that the pace at which USCIS adjudicates I-485 applications is discretionary. Accordingly, district courts should not consider whether USCIS is adjudicating I-485 applications at a reasonable pace under § 1361. *See, e.g., Grinberg v. Swacina*, __ F.Supp.2d __ 2007 WL 840109, at *1 (S.D. Fla. 2007) (holding that sections 242 and 245 of the INA preclude judicial review of any discretionary "decision or action" of the Attorney General in immigration matters including the pace at which immigration decisions are made.); *Safadi v. Howard*, 466 F.Supp.2d 696, 698-700 (E.D. Va.2006) (finding no jurisdiction under § 1361 because § 1255(a) grants USCIS discretion over the entire process of adjustment application adjudication and § 1252(a)(2)(B)(ii) precludes judicial review of any "action," meaning any act or series of acts, to include the pace at which that action proceeds); *Mustafa v. Pasquerell*, 2006 WL 488399 at *4 (concluding that the proper focus is whether Plaintiffs have a clear right to an immediate or expedited adjudication of their petition and application; if the timing of the relief sought is a matter within the discretion of the agency, there is no clear right to relief.); *Li v. Chertoff* , __F.Supp.2d ___ *5 (S.D. Cal. 2007) (concluding that as long as USCIS is making reasonable efforts to complete the adjudication, the pace required to complete that process is committed to their discretion.).

Other district courts' decisions have fallen on the other end of the spectrum with opposite conclusions. These courts allege that USCIS failed to adjudicate immigration applications within a reasonable period of time and have found jurisdiction to hear a mandamus suit because to hold otherwise would allow USCIS to potentially delay adjudicating immigration applications

indefinitely. *See, e.g., Gelfer v. Chertoff*, WL 902382 *2 (N.D. Cal. Mar. 22, 2007) ("Allowing the respondents a limitless amount of time to adjudicate petitioner's [I-485] application would be contrary to the 'reasonable time' frame mandated under 5 U.S.C. 555(b) and, ultimately, could negate the USCIS's duty under 8 C.F.R. 245.2(a) (5)"); *See Singh v. Still*, 470 F.Supp.2d 1064, 1068 (N.D. Cal. 2007) ("petitioners whose applications for adjustment in status are properly before the INS ... have a right, enforceable through a writ of mandamus, to have the applications processed within a reasonable time.").

Without any Ninth Circuit law addressing the immigration issue presented here, this Court elects to follow the majority of courts that have dismissed similar actions for lack of subject matter jurisdiction. As long as USCIS continues to make reasonable efforts to complete Plaintiffs' I-485 applications, the pace required to complete that process is committed to their discretion.[2] *See Li*, __F.Supp.2d ___ at *5 . Even accepting all of Plaintiffs' factual allegations as true, Defendants have provided sufficient evidence to demonstrate that the delay results from the increased national security issues and not agency inaction. Given the myriad of concerns facing law enforcement and national security in this post 9/11 world, Defendants' delay appears to be reasonable. "What constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." *Gelfer v. Chertoff*, 2007 WL 902382 * 3 (N.D. Cal. 2007) (internal citation and quotation omitted). Accordingly, this Court concludes that it does not presently have subject matter jurisdiction to entertain Plaintiffs' mandamus petition under § 1361 regarding USCIS's discretionary adjudication of Plaintiffs' I-485 applications.

Defendants' motion to dismiss Plaintiffs' complaint for writ of mandamus based on the Court lacking subject matter jurisdiction is therefore granted without prejudice.

2. Jurisdiction Under the Administrative Procedure Act

To invoke jurisdiction under the APA, a petitioner must show that (1) an agency had a nondiscretionary duty to act and (2) the agency unreasonably delayed in acting on that duty. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004). "[A] person suffering

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[2] The Court makes no determination whether a district court could ever have mandamus jurisdiction under § 1361 to hear a petition to compel USCIS to adjudicate an I-485 application.

legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 28 U.S.C. § 702. This includes judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 28 U.S.C. § 706(1). Plaintiffs argue that these statutes, in combination with the federal question statute, 28 U.S.C. § 1331, provide jurisdiction for the Court to hear their complaint.

"Failures to act are sometimes remediable under the APA, but not always." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id*. at 64 (emphasis in original). The essential allegation, that the action is "unreasonably delayed" is not a ground for jurisdiction. As the Supreme Court noted, "a delay cannot be unreasonable with respect to action that is not required." *Norton*, 524 U.S. at 63, n. 1. Therefore, a court only has jurisdiction to compel an agency to act within a certain time period under the APA when the agency is compelled by law to act within a certain time period. *See id.*

Plaintiffs contend that the Court should implement a "reasonable time period" standard and compel Defendants to process their naturalization applications. However, no statute or regulation dictates a time period within which USCIS must act. The only governing time limit is the APA's directive that agencies resolve matters within a reasonable time. *See* 5 U.S.C. § 555(b) (providing that each agency shall proceed to conclude a matter presented to it with due regard for the convenience and necessity of the parties and within a reasonable time). This regulation clearly affords wide discretion to USCIS in matters relating to the pace of the adjudication of I-485 applications. Plaintiffs have failed to identify any statute or regulation requiring the FBI and/or USCIS to complete their name checks in any period of time, reasonable or not. Therefore, the Court declines Plaintiffs' invitation to judicially impose new heightened requirements on the administrative agency charged with adjudication of naturalization applications.

The Court further concludes that 8 U.S.C. 1252(a)(2)(B)(ii), which precludes district courts from reviewing any discretionary act of USCIS, precludes this Court from reviewing whether Defendants have adjudicated Plaintiff's I-485 application within a reasonable period of time under the APA. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' complaint for

review under the APA for lack of subject matter jurisdiction.

3. Jurisdiction Under Declaratory Judgment Act

Title 28 U.S.C. § 2201 (the DJA) states that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Although the DJA enlarged the range of remedies available in federal courts, it did not extend federal courts' jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The DJA does not establish a new basis for jurisdiction in the federal courts, but merely establishes a new remedy, available in cases in which jurisdiction otherwise exists. *Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 599 (9th Cir. 1964). Since the Court has previously concluded that it does not presently have either mandamus jurisdiction or jurisdiction under the APA, the DJA does not confer jurisdiction. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' complaint for review under the DJA for lack of subject matter jurisdiction.

4. Conclusion

The Court concludes that it does not have subject matter jurisdiction to hear Plaintiffs' suit under a writ of mandamus pursuant to 28 U.S.C. § 1361, the APA, or the DJA. Accordingly, the Court grants Defendants' motion to dismiss Plaintiffs' entire suit.

Because the Court concludes it lacks mandamus jurisdiction based on the declaration of Wendy S. Clark stating that Plaintiffs' I-485 applications are delayed pending the completion of required security checks for Plaintiff Dong Liu, the motion is granted without prejudice.

C. Failure to State a Claim

Since the Court has concluded that it lacks subject matter jurisdiction to hear Plaintiffs' case, it declines to address whether Plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted.

III. CONCLUSION

For the reasons discussed, the Court **GRANTS WITHOUT PREJUDICE** Defendants' motion to dismiss for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: April 30, 2007

Hon. Roger T. Benitez
United States District Judge